IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.2549 OF 2005

Ghanshyam Chaturvedi ...Appellant

Vs.

Municipal Corporation of Greater Mumbai ...Respondent

Mr. A.A.Mirza for the Appellant
Mr. J.J.Xavier for the Respondent-Corporation.

CORAM: A.S.OKA, J.
DATED: MARCH 16,2006.

P.C.:

1. Heard Advocate for the Plaintiff and Advocate for the Respondent-Corporation. The challenge in this First Appeal is to the Judgment and Decree passed by the Trial Court by which the suit filed by the Appellant-Plaintiff has been dismissed. The Respondent-Corporation did not file written statement. However, the Appellant was permitted to lead evidence. It is not in dispute that all the documents which are produced before the Trial Court have been annexed to the compilation of the Memorandum of Appeal. Even the Affidavit of examination-in-chief of the Appellant-Plaintiff has been annexed.

2. The Respondent-Corporation issued a notice under Section 351 of the Mumbai Municipal Corporation, 1881 (hereinafter referred to as the said Act of 1888) to the Appellant on 24th October 2002 alleging that the Appellant has constructed

an unauthorised structure with a loft which was constructed by brick masonary walls and was covered A.C.Sheet roof.

3. The Appellant relied to the said notice on 27th November 2002. An order was passed by the Assistant Commissioner of K/West Ward on 14th July 2003 after considering the reply filed by the Appellant. By the said order, the Assistant Commissioner held that the structure in question was unauthorised and therefore he directed demolition of the said structure. A suit was filed by the Appellant in the Trial court for challenging the action under Section 351 of the said Act of 1888.

4. The learned Advocate for the Appellant submitted that as the suit structure was in existence on 1st January 1995, the same is protected in accordance with the policy of the State Government as the same is located in the area which is declared as a slum under The Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 (hereinafter referred to as the said Act of 1971). He submitted that the name of the predecessor in title of the Appellant is shown in the voters' list of the year 1995. He invited my attention to the receipt issued acknowledging the application made by the Appellant for grant of a photo pass. The learned Advocate for the Respondent stated that there is no evidence on record to show that the structure is situated in a slum area. Inviting my attention to the prayer made in

the plaint, he submitted that the Appellant has not challenged the legality and validity of the order dated 14th July 2003 passed by the Assistant Commissioner of the Respondent-Corporation on the basis of the notice issued under Section 351 of the said Act of 1888 and the suit was therefore not maintainable.

5. I have considered the submissions. It is apparent from the prayers made in the plaint that there is no challenge to the order dated 14th July 2003 passed by the Assistant Commissioner of the Respondent under Section 351 of the said Act 1888. By the said order the Assistant Commissioner held that the suit structure was unauthorised and is illegal. The challenge in the suit is confined to the show cause notice under Section 351 of the said Act of 1888 and consequential action of issuing notice under Section 488 of the said Act of 1888. Notwithstanding this defect which may go to the root of the matter, I have considered the submissions of the Advocate appearing for the Appellant on merits.

6. The only submission is that the suit structure is in an area which is declared as a slum under the said Act of 1971 and as the structure was in existence on 1st January 1995, the same is protected in view of the policy of the State Government. The Appellant has led evidence by filing an Affidavit in examination-in-chief. He has produced several documents. Admittedly, the Appellant has not produced any

document to show that the land on which the suit structure is situated was declared as a slum in accordance with the provisions of the said Act of 1971. Reliance was placed on a receipt. The said receipt is evidence of the fact that the Appellant submitted an application to the concerned authority praying for grant of photopass. By no stretch of imagination the said receipt will establish that the land on which the suit structure is situated is declared as slum or that the structure is a censused structure. The said application appears to have been made not by the Appellant but by his wife. In view of this position, the document showing entry of the name of the predecessor in title of the Appellant in the voters' list has no consequence. Hence the Appellant will not be entitled to the protection of the policy.

7. This is not a case where the Appellant has stated that the suit structure has been constructed after obtaining lawful permission. The protection is sought only on the ground of the aforesaid policy of the State Government. The Appellant has miserably failed to prove that the structure is protected by the said policy of the State Government.

8. The Advocate for the Appellant stated that the Respondent-Corporation has not filed written statement and therefore decree ought to have been passed in favour of the Appellant. There is no merit in the said submission. The Trial Court did not pass a decree under Order 8 Rule 5 of the

Code of Civil Procedure, 1908 and permitted the Appellant to lead evidence to establish his case. Even in reply to the notice under section 351 of the said Act of 1888, no case is made out by the Appellant that the suit structure is constructed after obtaining lawful permission. Therefore, the burden was on the Appellant to prove that the structure was protected under the said policy of the State Government. Having miserably failed to establish said fact, the suit structure could not have been protected. There is no merit in the Appeal and the same is dismissed with no order as to costs.

Judge.